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IN THE

Supreme Court of the United States

No. 214

FORT STREET UNION DEPOT COMPANY,
Petitioner,

vs.

MARGARET M. HILLEN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF SAMUEL HILLEN, DECEASED, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TOM DAVIS,
ERNEST A. MICHEL,
CARL L. YAEGER,
419 Metropolitan Bank Building,
Minneapolis, Minnesota,
Attorneys for Respondent.

EMERSON H. SCHINK,
Detroit, Michigan,
Of Counsel.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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NO QUESTIONS PRESENTED TO REQUIRE WRIT

This is simply an action to recover damages for personal injuries resulting in death because of a violation of the Safety Appliance Act pertaining to hand-holds.

On pages 5 and 6 under the heading "Questions Presented," nine questions are set forth as a basis for the granting of the Petition for Writ of Certiorari.

These questions are *not in fact presented* by the Record. Were all of these questions undetermined and were they presented by the Record, there would be no question but that a writ should be granted. But most of the questions are not presented. Those that are have been determined by decisions of this Court.

The decision of the Circuit Court of Appeals of the Sixth Circuit is consistent with all decisions of the Supreme Court of the United States bearing on the question of liability for violations of the Safety Appliance Acts.

FACTS

Before going into each of the questions set forth on pages 5 and 6 of the Petition, a brief statement of the facts will be made.

Hillen was riding upon the side of a railway car, being moved upon one of two parallel tracks. He was riding in the place and in the manner employees ordinarily and customarily rode (17, 18, 19, 27, 28). While riding in such position he was struck by a grab-iron, which protruded from a car on the adjoining track (25, 26). He was knocked from the car to the ground (25).

After Hillen was struck it was discovered that the lower end of the grab-iron on the car on the adjoining track was not fastened to the car.

To quote from the opinion of the Circuit Court—

> "A part of one of the two bottom bolts of the grab-iron was found in the snow on the ground nearby and appeared to have been sheared off or broken;" (175)
>
> * * *
>
> "One of appellee's witnesses testified that after the accident he noticed that the grab-iron *was bent outward towards the other track a distance of four or five inches* 'and a little towards the east'" (176).

Within a few minutes after the accident Hillen stated that he (to again quote from the opinion of the Circuit Court) "had been riding the corner of the car and had been struck in the back or hip by the grab-iron and 'got knocked off'" (176).

Hillen died as a result of the accident.

There was evidence by the defendant that the grab-iron was in perfect condition before the accident, this evidence being given by a porter and the club car conductor (103, 109). This evidence did not have a very satisfactory ring and was rejected by the jury, as was their privilege. (See

opinion Circuit Court—179.)

Defendant contended, although it had no proof of it, that Hillen's body struck the grab-iron, broke the bolts and bent the grab-iron. The train was going four or five miles an hour. Plaintiff offered testimony of an expert, which will be hereafter referred to, showing the impossibility of a man's body moving at that rate of speed breaking the bolts in question.

QUESTIONS PRESENTED

To return now to the questions presented, question 1 on page 5 asks whether the Safety Appliance Act is to be extended to "employees who were not engaged in making any use of the appliance."

That a recovery may be had even though the employee be not at the time making use of the appliance has been decided by this Court in *Minneapolis & St. L. R. Co. vs. Gotschall*, 244 U. S. 66, 61 L. Ed. 995, 37 Sup. Ct. 598. The right to recover has even been extended to cover a pedestrian at a highway crossing. See *Fairport vs. Meredith*, 292 U. S. 589, 78 L. Ed. 1446, 54 Sup. Ct. 826.

The rule was stated in *Davis vs. Wolfe*, 263 U. S. 239, 68 L. Ed. 284, 44 Sup. Ct. 64, that an employee "can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

As stated by the Circuit Court (181)—

> "It is not necessary that the employee be engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

The question as to whether the depot company was a common carrier, as asked in question 2 on pages 5 and 6 of the

Petition, is answered by the Circuit Court on page 180 of the Record by the citation of *Union Stock Yard Co. vs. United States*, 308 U. S. 213, 220.

Furthermore, the point as to whether the defendant was a common carrier was not in the case in view of the following: (We quote from the charge of the Court to the jury—141)

> "First, let me say that I think it is undisputed and conceded that the defendant is a common carrier; secondly, that it was at the time of the happening of the accident engaged in interstate commerce, or else these lines would not apply. So, those two assumptions you may take into consideration, if not as conceded, as the law.
>
> Counsel, I assume, *concedes* that they are a common carrier. However, counsel may object later on if that is not so—from the expression on counsel's faces. I will say this, that if counsel do not accept what the Court says—*but you accept it.*"

Question 3 on page 6 is as follows:

> "Where the testimony of credible and unimpeached witnesses is undisputed, may the jury be permitted to disregard the testimony and by surmise and conjecture assume the existence of facts favorable to its decision?"

The credibility of the testimony of the porter and the sleeping car conductor was for the jury. (Opinion Circuit Court —179.)

There was no question of surmise or conjecture in the case. The grab-iron did protrude four to six inches. This was no conjecture. This appeared positively by credible testimony of the witness Carey (31). There was no surmise or conjecture about a bolt being broken and the grab-iron being unfastened. This was *admitted* by defendant. (Answer of Claim Agent Fitzpatrick—10-11.)

Other of defendant's witnesses admitted this. See testimony of defendant's witness Dominas (118)—

> "Q. And did you notice the grab-iron?
>
> A. The grab-iron was bent, and the bottom bolts was sheared off, was broken off, and the grab-iron was bent towards east" (120).

We quote question 4 on page 6 of the Petition:

> "May the Circuit Court of Appeals arbitrarily disregard undisputed, credible and unimpeached testimony and assume the existence of facts which did not and could not exist to reach its decision?"

The Circuit Court cannot arbitrarily disregard undisputed, credible testimony, but in the present case the question of the credibility of the witnesses was for the jury. The Circuit Court *did not assume* the existence of any facts. There was no question but that the grab-iron was loose, and that it did hit Hillen, who was riding where he had a right to ride, in a place in which employees ordinarily and customarily rode. (Witness Sullivan, 18, 19; Carey, 27, 28, 29.)

The answer to question 5 is that the Circuit Court of Appeals did not disregard any necessary grounds of appeal. A reading of the opinion sufficiently shows that question 5 presents nothing for this Court.

We quote question 6 from page 6 of the Petition:

> "Is testimony admissible as *res gestae* when the circumstances relied on to make it admissible are not proved but are themselves presumed?"

No circumstances to make the *res gestae* testimony admissible were presumed. The simple fact was shown that the deceased was riding where he had a right to ride; that within a few moments after the accident he said that something had hit him in the back and knocked him off. The grab-iron was found protruding and in such a position that it lessened

the clearance between the cars.

Question 7 deals with inferences claimed to arise from the testimony of an expert witness. This clearly does not present a question for review by the Supreme Court of the United States.

Professor Drake of Wayne University was called as a witness (122). He said that it would have been impossible for the body of Hillen to have broken the steel bolts fastening the grab-iron to the car. At the time of the accident the car upon which Hillen was riding was going between four and five miles an hour. (Testimony of Engineer Dose, 37.)

> "It is my opinion that a body of that weight traveling at that speed could not shear those two bolts," and again, "in this particular case there is enough steel here —there would be in two bolts—to be four or five times as much steel as would be necessary to take that load that was put on it by the impact of that body against it." (Professor Drake, 126.)

Question 8 is as fo'lows:

> "Does a trial court err in submitting a question to a jury the decision of which must rest upon guess, speculation and conjecture?"

We readily concede that a trial court would err in submitting questions to a jury based upon guess, speculation and conjecture, but *that is not what was done here.* The case was based upon the *positive testimony* that the grab iron *was loose* from the end of the car, that it *protruded four to six inches;* that *it struck Hillen* in the back, *knocked him off* the car, and as a result of being struck in the back, Hillen died—so the question asked was not in the case.

Question 9 is as follows:

> "Where an employee unnecessarily adopts an extremely dangerous method of performing his work when an absolutely safe method is open to him and he receives

injuries through an accident which would not have occurred had he employed the safe method, is his own negligence the proximate cause of his injuries?"

There is *no evidence* that Hillen unnecessarily adopted an extremely dangerous method of performing his work. Even had there been such a question presented, the issue would have been for the jury under the decision of this Court in *Socony-Vacuum Oil Co. vs. Smith*, 305 U. S. 422, 83 L. Ed. 265, 59 Sup. Ct. 262, but the question is not even in the case as a fact issue for the jury.

On page 8 of the Petition it is said that the Circuit Court of Appeals held "that a plaintiff, in order to recover for injuries alleged to have been sustained as a result of a violation of the Safety Appliance Act, need prove merely that at some indefinite time after the accident there was a defective appliance."

It is further said that the Circuit Court relieved plaintiff from the burden of proof. This statement is not correct.

The Court instructed the jury as follows:

"That it is the duty of the plaintiff to satisfy you by a preponderance of the evidence that there was this defective or ill-placed or dangerously placed grab-iron. That must be established by a preponderance of the evidence.

If you find that it was not a defective grab-iron that caused the accident, that that was not one of the moving or proximate causes, then, of course, your verdict will be for the defendant.

If you find that the evidence introduced by the defendant outweighs that of the plaintiff it would then be your duty to bring in a verdict for the defendant, because that would mean that the plaintiff has not established the negligence complained of by a preponderance of the evidence" (145).

The evidence amply justified this instruction and the Circuit Court upheld the trial court, but made no such holding as suggested by the question.

On page 9, reason 6 for granting the writ is that the employee was not "*within the class* of employees designed to be protected by Section 4 of the Safety Appliance Act."

This question is answered by the case of *Fairport vs. Meredith*, 292 U. S. 589, 78 L. Ed. 1446, 54 S. Ct. 826, and *Swinson vs. C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 79 L. Ed. 1041, 55 Sup. Ct. 517.

The reason for granting the writ assigned in point 7 on page 9 as to *res gestae* testimony does not present a question for consideration by this Court.

See *Director General vs. Clark*, 261 U. S. 621, 67 L. Ed. 831, 43 Sup. Ct. 432, where the petition for certiorari raised the same point.

This case presented purely fact questions. No useful purpose could be presented by a determination of the cause by this Court, which determination under the settled decisions of this Court could only be a reaffirmation of established rules.

Respectfully submitted,

TOM DAVIS,
ERNEST A. MICHEL,
CARL L. YAEGER,
419 Metropolitan Bank Building,
Minneapolis, Minnesota,
Attorneys for Respondent.

EMERSON H. SCHINK,
Detroit, Michigan,
Of Counsel.